LIBRARY
SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
OCT 21 1971
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1971

No. 71-402

GEORGE A. OTTO

Petitioner,

v.

BELTWAY BELT & TERMINAL RAILWAY COMPANY,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JAMES J. LOEFFLER
TOMMY B. DUKE
A. J. HARPER II
Attorneys for Respondent

1st National
First National Bank Building
Bank of the Southwest
Building
Houston, Texas 77002

PRINTING COMPANY, INC., HOUSTON

TABLE OF AUTHORITIES

Court Decisions

Bower v. *Eastern Airlines, Inc.*, 214 F.2d 623 (3d Cir. 1954), *cert. denied*, 348 U.S. 871 6

D'Elia v. *New York, N.H. & Hartford R.R.*, 338 F.2d 701 (2d Cir. 1964), *cert. denied*, 380 U.S. 978 6

Edwards v. *St. Louis—S.F. Ry.*, 361 F.2d 946 (7th Cir. 1966) 6

Ellerd v. *Southern Pacific R.R.*, 241 F.2d 541 (7th Cir. 1957) 5

Gunther v. *San Diego & Arizona E. Ry.*, 362 U.S. 257 ..... 4, 5

Helvering v. *Gowan*, 302 U.S. 238 (1937) 3

Jaffe v. *Dunham*, 352 U.S. 280 (1957) 3

Rosen v. *Eastern Airlines, Inc.*, 400 F.2d 462 (5th Cir. 1968), *cert. denied*, 394 U.S. 959 5,6

SEC v. *Chenery Corp.*, 318 U.S. 80 (1943) 3

Southern Pacific Co. v. *Wilson*, 378 F.2d 533 (5th Cir. 1967) .6

Todd v. *Northwest Airlines*, 325 F. Supp. 79 (D. Wash. 1969), *aff'd*, 438 F.2d 527 (9th Cir. 1971), *cert. denied*, 403 U.S. 910 6

Union Pacific R.R. v. *Price*, 360 U.S. 601 (1959) 5

United Steel Workers v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960) 4

Wooley v. *Eastern Airlines, Inc.*, 250 F.2d 86 (5th Cir. 1957) 6

Arbitration Decisions

Trans World Airlines, Inc., 63-2 CCH Arb. ¶ 8789 (1969)..... 4

Statutes

Railway Labor Act, as amended, 45 U.S.C. § 151 et seq..... 2

National Labor Relations Act, as amended, 29 U.S.C. § 185.... 4

TOPICAL INDEX

OPINIONS BELOW 1

QUESTION PRESENTED 1

STATEMENT OF CASE 1-2

REASONS FOR DENYING WRIT

I. The Application by the Public Law Board of a Well-Accepted Arbitration Standard Does Not Constitute a Denial of Due Process 3-5

II. Court Review of Decisions of Public Law Boards on the Merits is Very Narrow and Circumscribed .. 5

III. The Decisions of Lower Courts Which Have Considered Contentions Similar to Petitioner's Have Consistently Rejected Such Claimed Denials of Due Process 6-7

CONCLUSION 7

CERTIFICATE OF SERVICE 8

IN THE

Supreme Court of the United States

OCTOBER TERM 1971

No. 71-402

GEORGE A. OTTO

Petitioner.

v.

HOUSTON BELT & TERMINAL RAILWAY COMPANY,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

OPINIONS BELOW

The decision of the United States Court of Appeals for the Fifth Circuit is officially reported at 444 F.2d 219.

QUESTION PRESENTED

Even though not presented nor directly passed upon by the Courts below, does the award and decision of Public Law Board No. 89 (Petition, App. "A", p. 9) deny Petitioner due process of law?

STATEMENT OF THE CASE

Petitioner's statement (Petition, pp. 2-5) is generally accurate in its recitation of background facts, but Respond-

ent, Houston Belt & Terminal Railway Company, believes that some amplification of Petitioner's contention as to the issue presented to the Courts below is necessary (Petition, pp. 4-5). Petitioner alleged in the District Court that he had been denied due process rights in connection with the on-property investigation of the Respondent which occurred pursuant to the collective bargaining agreement between the Respondent and the Petitioner's collective bargaining representative, Brotherhood of Railroad Trainmen. Petitioner did not, in the District Court, raise any issue or contention of a denial of due process by the Public Law Board, constituted pursuant to the Railway Labor Act, 45 U.S.C. § 151 et seq. (1964) (hereinafter referred to as the "Act"), until after the Memorandum and Order of the District Court (Petition, App. "B", p. 12) had been entered. Such issue was raised for the first time when Petitioner appealed to the United States Court of Appeals for the Fifth Circuit.[1] Further, the District Court did not, as Petitioner asserts, grant Respondent's Motion to Dismiss on the "apparent" theory that the hearing before the Public Law Board was not shown "to be lacking in impartiality or due process," but rather the District Court's Memorandum and Order granted Respondent's Motion to Dismiss on the ground that it was without jurisdiction to review the conduct of an on-property investigation pursuant to a collective bargaining agreement between the Defendant and the Brotherhood of Railroad Trainmen (Petition, App. "B", pp. 17-18). The District Court did note, however, that the mere fact that a Board relied on evidence adduced at a carrier's on-property investigation did not establish a violation of due process rights by that Board (Petition, App. "B", p. 17).

---

[1] Petitioner arguably raised the issue of the alleged denial of due process by the Public Law Board in a Motion for Rehearing to the District Court, which was denied.

REASONS FOR DENYING THE WRIT

I.

The Application by the Public Law Board of a Well-Accepted Arbitration Standard Does Not Constitute a Denial of Due Process

Laying aside the question of whether or not the issue raised in the Petition for Certiorari was ever properly presented to the Courts below,[2] it is clear from a review of the award of the Public Law Board (Petition, App. "A", p. 9) that the Board did not abdicate its function or abridge the Petitioner's right to procedural fairness as contended by Petitioner. The Board did not state, as Petitioner contends, that it did not have the right or power to supplant the decision of the Respondent, nor did the Board state that it was "impotent to modify the judgment of the carrier". Further, Respondent's determination to terminate Petitioner because of his violation of Rule "N" was not deemed by the Public Law Board to be "final and infallible", but rather, contrary to Petitioner's contention, the Public Law Board evaluated the decision of Respondent to terminate Petitioner, including an examination and evaluation of the evidence relied upon by the Respondent. Based upon this review, the Board found that there was no basis for overturning Respondent's judgment, that is, it concluded that the Respondent's decision was not "harsh, arbitrary or unjust," and that, therefore, the Board would not supplant its judgment for the judgment of Respondent (Petition, App. "A", pp. 10-11).

Petitioner's complaint against the decision of the Public

---

[2] Even though not properly raised before the lower courts, the judgment of the lower courts can and should be sustained on consideration of the issue presented by the Petition for Certiorari. See *Jaffe* v. *Dunham*, 352 U.S. 280, 281 (1957); *SEC* v. *Chenery Corp.*, 318 U.S. 80, 88 (1943); and *Helvering* v. *Gowan*, 302 U.S. 238, 245 (1937).

Law Board is directed to the *standard* utilized by the Board in rendering its decision. The standard utilized by the Public Law Board in rendering its decision is a common standard utilized in arbitration proceedings. It is apparent from a review of the decision of the Public Law Board that the statement of the standard, vigorously attacked by Petitioner, when taken in context, clearly follows the established arbitration standard that a decision of a company should not be reversed or overturned by the arbitrator unless that decision was unfair, unjust or arbitrary. *See, e.g., Trans World Air Lines, Inc.*, 63-2 CCH Lab. Arb. ¶ 8789 (1969) ("Under the generally accepted rule, if management's original decision in the matter was not arbitrary, capricious, or unreasonable, or based on mistake of fact, its decision should stand. Furthermore, the boundaries of reasonableness should not be so narrowly drawn that management's judgment must coincide exactly with the arbitrator's judgment.").

Indeed, this Court has pointed out that adjustment boards, as arbitrators, are "not limited to common-law rules of evidence . . ." in considering and determining the merits of a controversy presented to it. *Gunther* v. *San Diego & Arizona E. Ry.*, 382 U.S. 257, 262 (1965).

Similarly, this Court has, under § 301 of the National Labor Relations Act, as amended (29 U.S.C. § 185), indicated that broad latitude is granted to arbitrators in formulating and resolving issues arising under a collective bargaining agreement, and the role of the courts is a very restrictive role in reviewing the arbitrators' approach. *United Steel Workers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593, 596-597, 599 (1960). Petitioner's attack on the award of the Public Law Board in this case seeks to enmesh this Court, and the lower courts, in reviewing and determining the propriety of the underlying rationale and

standards utilized by arbitrators in rendering their decision, contrary to the narrow strictures of review heretofore established.

II.

Court Review of Decisions Of Public Law Boards on the Merits Is Very Narrow and Circumscribed

It is too well established to require extended discussion that review of decisions by Public Law Boards under the Act is extremely narrow and circumscribed. The narrow standards of review applicable to the awards of Public Law Boards do not require, indeed do not permit, any exhaustive analysis or fact finding by the District Court but require only the determination of a matter of law — whether the decision of the Public Law Board was wholly baseless and without reason or constituted a denial of due process of law. *Gunther* v. *San Diego & Arizona E. Ry.*, 382 U.S. 257 (1965); *Union Pacific R.R.* v. *Price*, 360 U.S. 601 (1959); *Ellerd* v. *Southern Pacific R.R.*, 241 F.2d 541 (7th Cir. 1957)) (cited with approval in *Union Pacific R.R., supra*); and *Rosen* v. *Eastern Airlines, Inc.*, 400 F.2d 462, 464 (5th Cir. 1968), *cert. denied*, 394 U.S. 959.

III.

The Decisions of Lower Courts Which Have Considered Contentions Similar To Petitioner's Have Consistently Rejected Such Claimed Denials of Due Process

There is a consistent uniformity among the lower courts which have considered similar questions of due process rights to that raised by Petitioner's attack on the standard utilized by the Public Law Board. The lower courts have consistently held that contentions such as Petitioner's do not establish or raise an issue of the denial of due process. The lower courts have held that to set aside an award

of a board based on a denial of due process, such award must be so lacking in due process as to allow a collateral attack on the jurisdiction of the board. *Rosen* v. *Eastern Airlines, Inc.*, 400 F.2d 462, 464 (5th Cir. 1968), *cert. denied*, 394 U.S. 959; *Southern Pacific Co.* v. *Wilson*, 378 F.2d 533, 536-37 (5th Cir. 1967); *Edwards* v. *St. Louis-S.F. Ry.*, 361 F.2d 946, 953 (7th Cir. 1966); *D'Elia* v. *New York, N.H. & Hartford R.R.*, 338 F.2d 701, 702 (2d Cir. 1964), *cert. denied*, 380 U.S. 978; *Wooley* v. *Eastern Airlines, Inc.*, 250 F.2d 86, 90-91, 92 (5th Cir. 1957); *Bower* v. *Eastern Airlines, Inc.*, 214 F.2d 623, 626-627 (3d Cir. 1954), *cert. denied*, 348 U.S. 871; and *Todd* v. *Northwest Airlines*, 325 F. Supp. 79 (D. Wash. 1969), *aff'd*, 438 F.2d 527 (9th Cir. 1971), *cert. denied*, 403 U.S. 910.

CONCLUSION

It is clear from a reading of the award of Public Law Board No. 89 (Petition, App. "A", p. 9) that the Public Law Board's award is not wholly baseless or without reason and is not lacking in due process. The determination of Respondent to terminate Petitioner, and the basis therefore, was reviewed and considered by the Public Law Board, and after and upon such review, the determination of Respondent was upheld. Under these circumstances, and in view of the uniformity among the Circuits which have considered this question, the Petition for Certiorari should be denied.

Respectfuly submitted,

FULBRIGHT, CROOKER &
JAWORSKI

By James J. Loeffler
James J. Loeffler
Tommy B. Duke
A. J. Harper II

CERTIFICATE OF SERVICE

I, James J. Loeffler, one of the attorneys for Houston Belt & Terminal Railway Company, Respondent herein, do hereby certify that true and correct copies of the foregoing Brief were served on the Petitioner, George A. Otto, on this the 19 day of October, 1971, by mailing same through the United States mail, postage prepaid, to his Attorney of Record at the following address:

Mr. Ben G. Levy
2244 West Holcombe Blvd.
Houston, Texas 77025

James J. Loeffler
James J. Loeffler